INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Summary of argument	8
Argument:	
I. The district court properly refused to dismiss the indictment in response to the claim that the grand jury heard insufficient evidence	11
A. An indictment, valid on its face, returned by a properly constituted grand jury is not subject to attack on the ground that it rests on insufficient evidence	12
B. The indictment was properly based upon the testimony of an Internal Revenue agent, who summarized for the grand jury affidavits made by persons who were indicted with petitioner or under indictment	15
C. There is no reason to impute bad faith to the prosecutor in failing to call before the grand jury witnesses who were about to be indicted	18
II. The district court properly declined to turn over statements by the witnesses recounting the acceptance of bribes by persons other than petitioner	20
A. Although 18 U.S.C. 3500 requires the production of statements useful for cross-examination, it was designed to avoid production of irrelevant material, particularly that involving needless exposure of other persons	22
B. Since the material withheld did not bear on the charge at issue and involved persons not on trial, the trial court properly exercised its discretion in declining to turn it over	25

Argument—Continued Page

C. Petitioner's present theories concerning the need for the withheld material on the basis of the particular answers given by the witnesses at trial were not advanced to the trial court and are not supported by the record 27

III. Petitioner was not convicted of mutually inconsistent crimes 30

IV. Petitioner could properly be convicted of aiding and abetting the receipt of illegal fees by internal revenue agents 34

Conclusion 36

Appendix A 37

Appendix B 39

CITATIONS

Cases:

Aguilar v. *Texas*, 378 U.S. 108 16
Brinegar v. *United States*, 338 U.S. 160 17
Costello v. *United States*, 350 U.S. 359 ..... 9, 12, 14, 17
Coulston v. *United States*, 51 F.2d 178 26
Duignan v. *United States*, 274 U.S. 195 33
Hirabayashi v. *United States*, 320 U.S. 81 30
Holt v. *United States*, 218 U.S. 245 12
Homan v. *United States*, 279 F.2d 767, certiorari denied, 364 U.S. 866 25
Jencks v. *United States*, 353 U.S. 657 23
Lawn v. *United States*, 355 U.S. 339 ..... 9, 12, 30, 33
Levine v. *California*, 347 U.S. 128 33
Local 1976, United Brotherhood of Carpenters v. *N.L.R.B.*, 357 U.S. 93 33
May v. *United States*, 175 F.2d 994, certiorari denied, 338 U.S. 830 35
McCray v. *Illinois*, 368 U.S. 300 17
Ogden v. *United States*, 303 F.2d 724 22
Palermo v. *United States*, 360 U.S. 343 26
Powell v. *United States*, 226 F.2d 269 18

Cases—Continued Page

Pullman Co. v. *Hall*, 55 F.2d 139 26
Rosenberg v. *United States*, 360 U.S. 367 22
Silber v. *United States*, 370 U.S. 717 33
Simon v. *United States*, 123 F.2d 80, 85, certiorari denied, 314 U.S. 694 26
Wood v. *Georgia*, 370 U.S. 375 13
United States v. *Atkinson*, 297 U.S. 157 33
United States v. *Blue*, 384 U.S. 251 12
United States v. *Cleary*, 164 F. Supp. 328, reversed, 265 F.2d 459, certiorari denied, 360 U.S. 936 18
United States v. *Irwin*, 354 F.2d 192, certiorari denied, 383 U.S. 967 ..... 26, 31
United States v. *Johnson*, 337 F.2d 180, certiorari denied *sub nom. Edlin* v. *United States*, 385 U.S. 846 35
United States v. *Kenner*, 354 F.2d 780, certiorari denied, 383 U.S. 958 35
United States v. *Minuse*, 142 F.2d 388 23
United States v. *Payton*, 363 F.2d 996, certiorari denied, 385 U.S. 993 ..... 14, 20
United States v. *Provoo*, 215 F.2d 531 26
United States v. *Sager*, 49 F.2d 725 26
United States v. *Scully*, 225 F.2d 113, certiorari denied, 350 U.S. 897 18
United States v. *Sweeney*, 262 F.2d 272 26

Statutes and rules:

18 U.S.C. 2 ..... 32, 34
18 U.S.C. (1948 ed.) 2(a) 34
18 U.S.C. (1958 ed.) 201 ..... 4, 11, 33, 34, 37
18 U.S.C. 201(b) 2, 4, 30, 31, 37
18 U.S.C. 201(f) 2, 4, 30, 31, 38
18 U.S.C. 201(g) 4
18 U.S.C. 3500 ..... 2, 9, 19, 22
26 U.S.C. 7214 ..... 33, 38
26 U.S.C. 7214(a)(2) 2, 4, 32, 38

Rules of the Supreme Court:

23-1(c) 33
40-1(d)(2) 33

Miscellaneous:

	Page
H. Rep. No. 700, 85th Cong., 1st Sess.	23, 24
H. Rep. No. 748, 87th Cong., 1st Sess.	32
S. Rep. No. 981, 85th Cong., 1st Sess.	24
S. Rep. No. 1020, 82d Cong. 1st Sess.	34
S. Rep. No. 2213, 87th Cong., 2nd Sess.	31

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 41

SAM UMANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 138-147) is reported at 368 F.2d 725.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1966. A petition for rehearing was denied on November 15, 1966. Mr. Justice Harlan extended the time for filing a petition for a writ of

certiorari to January 14, 1967. The petition was filed on January 12, 1967, and the writ was granted on February 27, 1967 (R. 159; 386 U.S. 940).

QUESTIONS PRESENTED

1. Whether the indictment should have been dismissed on the ground that it had been returned on the basis of hearsay evidence.

2. Whether the trial court properly exercised its discretion in withholding from petitioner statements by government witnesses admitting the receipt of bribes from persons other than petitioner.

3. Whether petitioner's convictions under 18 U.S.C. 201(b) and (f) involve mutually inconsistent crimes and must therefore be reversed.

4. Whether petitioner was properly convicted of aiding and abetting Internal Revenue agents in receiving fees prohibited by 26 U.S.C. 7214 (a)(2).

STATUTE INVOLVED

18 U.S.C. 3500 provides in pertinent part:

* * * *

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of

the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. * * *

The other relevant statutes are set forth in the Appendix, *infra*, pp. 37-38.

STATEMENT

1. Petitioner, a certified public accountant, and six Internal Revenue Service employees were indicted in August 1964, in the Southern District of New York, on charges arising out of the giving and receiv-

ing of sums of money in connection with the examination of income tax returns (R. 17). On March 25, 1965, petitioner and the same six employees were reindicted in a twenty-seven count superseding indictment. Counts 1 through 9, embracing nine separate transactions prior to January 20, 1963, charged four of the participating government employees with receiving illegal fees, and petitioner with aiding and abetting them, in violation of 26 U.S.C. 7214(a)(2). In counts 16 through 24, involving these same transactions, petitioner was additionally charged with giving money to the employees in order to influence their official acts, in violation of former 18 U.S.C. (1958 ed.) 201 (in effect through January 20, 1963). Counts 10 through 12 (embracing transactions subsequent to January 20, 1963), charged that petitioner paid money to three employees, Jeremiah Clyne, Lawrence Montello and Jeremiah Ryan "for or because of official acts", in violation of 18 U.S.C. 201(f). In counts 25 through 27, covering these same transactions, petitioner was charged with paying money to these three employees "with intent to influence official acts", in violation of 18 U.S.C. 201(b). In counts 13 through 15, the three employees were charged with receipt of this money from petitioner because of official acts performed by them, in violation of 18 U.S.C. 201(g) (R. 6-11). The six Internal Revenue Service employees pleaded guilty (R. 1-3). Petitioner was found guilty as charged by a jury and was sentenced to imprisonment for two years on each count under

which he was charged, the terms to run concurrently (R. 24-25).

2. The sufficiency of the evidence is not challenged here. In brief, it showed that petitioner appeared before the audit section of the Internal Revenue Service on behalf of taxpayers to justify deductions taken on their income tax returns for travel and entertainment expenses and contributions. The deductions claimed in the tax returns ranged from $1750 to $5200 (See, *e.g.*, R. 36-37; 83; Ex. 8). In some instances, the office auditor was told that petitioner was a friend of the group supervisor (R. 32-33), or that he should give the return "favorable tax treatment" (R. 100). In other instances, petitioner promised to pay the auditor if he would confine the scope of his disallowances (R. 66, 82). Petitioner and the office auditor would then agree that a part of the deductions could be disallowed in amounts ranging from $400 to $1200 (See, *e.g.*, R. 70, 67; Ex. 8). Some of the auditors thereafter prepared audit reports reciting that they had seen documentary evidence supporting a substantial part of the deductions claimed, although in fact they had been given no such evidence (see, *e.g.*, R. 57, 82-83; Ex. 8). Some were shown substantiation for part of the amount claimed (See, *e.g.*, R. 36). The six auditors and the one supervisor involved were paid by petitioner in amounts ranging from $25 to $75 with respect to each audit (See, *e.g.*, R. 46, 84, 95). One of the auditors accepted money from petitioner on five occasions (R. 58-59), another

was paid twice (R. 68-71) and the other four received money on a single occasion.

3. At the trial, the six auditors (named as co-defendants with petitioner) and the supervisor (named as as a defendant in another case) were the principal witnesses against petitioner. At the conclusion of the direct examination of the first auditor, petitioner asked for the "Section 3500 material". The government turned over a statement (Ex. 101) of the witness covering his transaction with petitioner, and testimony given by the witness before a previous grand jury (Ex. 105). The testimony (as distinguished from the statement) dealt exclusively with transactions involving accountants other than petitioner (R. 37-39). The government refused to turn over additional statements of the witness (Exs. 102, 103, 104) on the ground that they did not relate to the direct testimony. Petitioner's counsel then stated (R. 38):

> May I note for the record, your Honor, my position with respect to any portions of any statement which the government desires not to produce for my examination? I respectfully submit that every statement made by this witness should be turned over to defense counsel for use in cross-examination.

The court, after examination of the withheld statements, agreed with the government (Tr. 79).

The same procedure was followed in connection with the other witnesses (R. 47-49, 58-59, 72-73, 84-85, 96-97, 103-104; Tr. 232-233), all of whom had testified before a previous grand jury. With one ex-

ception, the grand jury testimony and the grand jury exhibits (Exs. 106, 113, 119, 119A, 132, 139, 146, 148, 154) which were turned over dealt with transactions with other accountants. A single witness did mention the receipt of money from petitioner in connection with income tax matters (Ex. 148).[1]

All of those prior statements by the witnesses which were not made available to petitioner were ordered sealed (R. 4) and have been forwarded to this Court. The court of appeals stated that the withheld statements "relate to payments received by the government witnesses from persons other than appellant, and the material not furnished to appellant in no way related to him" (R. 146). Some of the statements which were turned over to petitioner (Exs. 107, 128, 137), however, did mention transactions with other accountants. Petitioner, in his cross-examination, asked five of the witnesses about payments they had received from other accountants (Tr. 88-94, 185-195, 316-327, 386-392, 444-448). He also questioned two of these witnesses about their trial testimony in three other bribery cases (R. 86; Tr. 191-192, 450-451).[2]

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[1] The trial witnesses who testified before a previous grand jury did so in the early stages of investigation, between January and March 1964. Their affidavits were prepared after their grand jury testimony and, as indicated in the text, were summarized in the proceedings before the second grand jury.

[2] Petitioner himself did not testify and presented no witnesses.

4. During the trial, petitioner elicited from the auditor-witnesses who testified for the government the fact that they had not testified before the grand jury which indicted six of the witnesses and petitioner in March 1965. At the conclusion of the case, petitioner moved to dismiss the indictment and requested the court to examine the grand jury minutes to determine whether there was sufficient evidence before the grand jury "even under the case of U.S. v. Costello." The court denied his motion and request (R. 106). In its brief in the court of appeals, the government stated that, before the grand jury, it had called as its witness an agent of the Internal Revenue Service and that he had testified that the named auditors (who testified at trial) executed affidavits in connection with an investigation relating to Mr. Umans. The agent, the government advised, had summarized the portions of the affidavits relating to the illegal payments made by Umans.

The court of appeals overruled petitioner's contention that the trial judge had abused his discretion in denying petitioner's request to inspect the minutes of the grand jury in order to determine whether there was testimony to support the indictment.

SUMMARY OF ARGUMENT

I

An indictment, valid on its face, returned by a properly constituted grand jury is not subject to attack on the ground that it rests on insufficient evi-

dence. *Costello* v. *United States*, 350 U.S. 359; *Lawn* v. *United States*, 355 U.S. 339. The Constitution made the grand jury, not the trial court, the guardian against the institution of arbitrary criminal charges, placing its trust in the individual consciences of the veniremen rather than in rules of procedure or evidence. There is thus no reason for an intermediate preliminary trial to determine whether there should be a trial before a petit jury.

In addition, the testimony of an internal revenue agent—who summarized for the grand jury affidavits made by persons either indicted with petitioner or already under indictment—was more than sufficient to establish probable cause. Since these affiants were subject to prosecution, there is no doubt that the grand jury could credit their verified statements against interest without calling them as witnesses.

The prosecutor's action in relying on this testimony does not support an inference of bad faith. There are strong policy considerations against calling *de facto* defendants as grand jury witnesses. It also appears that there were statements of the witnesses, which the prosecutor knew would be available to the defense under 18 U.S.C. 3500.

II

The district court properly refused to turn over to the defense statements by the witnesses admitting the receipt of bribes from persons other than petitioner and having no relationship to him. The Jencks statute compels the production of statements which

may be useful in the conduct of permissible cross-examination while at the same time affording protection against needless exposure of confidential information. It, therefore, does not require the production of irrelevant material, especially information about the activities of persons not on trial. Here, the trial court had discretion whether to allow any effort at impeachment of the witnesses on the basis of other similar acts of misconduct. It likewise had discretion to refrain from ordering the production of statements dealing with matters which it would not, and need not, permit counsel to pursue on cross-examination, particularly since counsel had ample independent basis for proper cross-examination. Petitioner's present theories as to the relevance of the withheld material were not advanced to the trial court and are not supported by the record.

III

Petitioner was not convicted of mutually inconsistent crimes since there is no repugnancy in the statutes forbidding payments to federal employees under which he was charged. Both the history and language of these statutes demonstrate that Congress proscribed all unauthorized payments to federal employees, and that it distinguished between the greater and lesser offenses which it created by requiring additional rather than contradictory elements of proof.

IV

The conviction of aiding and abetting the receipt of illegal fees by internal revenue agents was proper

This is made clear by the 1951 amendment to the aider and abettor statute, wherein Congress expressly declared its intent to punish persons incapable of committing the specific violation which they were charged with aiding and abetting.

ARGUMENT

I

The District Court Properly Refused to Dismiss the Indictment in Response to the Claim That the Grand Jury Heard Insufficient Evidence.

The grand jury indicted petitioner and six revenue employees in a single indictment charging the giving and receiving of bribes. This indictment superseded an indictment returned earlier against petitioner and his six co-defendants and was one of a series of indictments involving numerous defendants returned in the course of grand jury investigations into a widespread pattern of corruption within the New York City offices of the Internal Revenue Service. The grand jury, as a basis for its action, heard an internal revenue agent who summarized affidavits of the six co-defendants and the affidavit of a seventh revenue employee, Seymore Levine, separately indicted (R. 145). The affidavits, turned over during the trial, implicated the affiants and petitioner in the receipt and payment of particular sums of money during the audit or examination of specific tax returns. The grand jury did not ask to see the affidavits, and it did not summon the co-defendants (the principal witnesses at the trial) to verify their sworn statements. Petitioner's claim is that the indictment was

invalid and his conviction void because the grand jury heard insufficient evidence upon which to return an indictment. He argues that the trial court had a duty to examine the minutes of the grand jury to review the testimony upon which it acted. We urge, on the contrary, that it is not the function of the trial court to review the sufficiency of the evidence before the grand jury and that the evidence was in all events sufficient to establish probable cause for the trial of petitioner before a petit jury.

A. *An Indictment, Valid on Its Face, Returned by a Properly Constituted Grand Jury Is Not Subject to Attack on the Ground That It Rests on Insufficient Evidence.*

In *Costello* v. *United States*, 350 U.S. 359, this Court unanimously held that a defendant has no right to go behind an indictment, valid on its face, returned by a legally constituted and unbiased grand jury, in order to determine the sufficiency of the evidence upon which it acted. In so ruling, it reviewed the history of grand jury proceedings and adhered to its earlier decision in *Holt* v. *United States*, 218 U.S. 245. More recently, this ruling was reaffirmed in *Lawn* v. *United States*, 355 U.S. 339. See also *United States* v. *Blue*, 384 U.S. 251. We submit that there is no sound reason to depart from the settled rule and to place upon the trial court the duty of weighing the evidence before the grand jury and appraising its determination of probable cause.

The Constitution entrusted the grand jury with the function of initiating serious criminal charges. It

alone was given the power to decide whether a particular person should be required to stand trial before a petit jury. The Founders' conviction was that a body of laymen chosen for a limited term could perform this function more wisely and fairly than a regularly appointed official. As this Court said in *Wood* v. *Georgia*, 370 U.S. 375, 390, "[h]istorically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution."

The grand jury is thus the chosen instrument that the Constitution provides to guard against arbitrary indictment. Petitioner is in the position of arguing that the courts should protect him from the possibly mistaken actions of the very agency which has been selected to provide a buffer against arbitrary prosecution.

The safeguard which inheres in the institution of the grand jury does not lie in formalized requirements as to the kind or quantum of evidence. This is obvious since the scheme has no place for cross-examination or other means of testing the evidence through an adversary process. The protection which it affords is, in essence, the conscience of each member of the grand jury. Certainly, a grand jury is not infallible. No one has ever supposed that it would be. The supposition, however, was that additional protections were to be provided only through the medium of the trial. An indictment, while a serious step in a criminal proceeding, is but a preliminary step to a trial before a petit jury.

Moreover, the probability that a prosecutor, who must try the case, will urge a grand jury to return an indictment which he cannot reasonably expect to prove, and that twelve men, drawn from the community at large, will vote for an indictment which has no reasonable basis in fact is remote. Nothing in federal experience suggests a need to place between the grand jury and the trial to a petit jury an intervening process of review. What this Court said in the *Costello* case, 350 U.S. at 363-364, is no less applicable today:

> * * * If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. * * *
>
> * * * Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.

The possibility—which has always existed—that an individual prosecutor, in a particular case, might abuse his office and present weak evidence deliberately to a grand jury for ulterior motives (see *United States* v. *Payton*, 363 F. 2d 996, 999 (C.A. 2) (dissenting opinion), certiorari denied, 385 U.S. 993), hardly justifies an effort to overthrow the premises

upon which the constitutional system of indictment by grand jury rests.[3]

It is unnecessary to argue that there is no case in which a district judge would have power to step in and dismiss an indictment regardless of circumstances showing that the grand jury's action had been capricious. Even assuming that the rule leaves room for rare exceptions, the mere fact that witnesses at the trial did not personally appear before the grand jury—the only showing that petitioner did or could make—hardly amounts to a showing that the grand jury acted arbitrarily or capriciously. As we point out below, sworn affidavits by seven internal revenue agents that they accepted money from petitioner to influence official action meets the standard of probable cause which petitioner argues this Court should adopt as a basis for judicial review of grand jury action.

B. *The Indictment Was Properly Based upon the Testimony of an Internal Revenue Agent, Who Summarized for the Grand Jury Affidavits Made by Persons Who Were Indicted with Petitioner or under Indictment.*

The indictment, as noted above, was based upon the testimony of an internal revenue agent who summarized affidavits of the persons who were the principal witnesses at petitioner's trial. Six of these persons were indicted with petitioner and the seventh

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[3] The judge who impanels a grand jury may always instruct it, of course, concerning its obligations.

had been separately indicted. This testimony, we submit, furnished ample basis for the return of an indictment.

There was no apparent need for the prosecutor or the grand jury to insist on calling in person individuals whom they were planning to indict. The existence of wide-scale corruption in the Internal Revenue Service had already been established before a previous grand jury. It had heard the witnesses at an earlier stage in the investigation, including the supervisor, Levine, who had implicated petitioner. The prosecutor still had their sworn affidavits.

It was also eminently reasonable that the grand jury should conclude, on the basis of statements by seven internal revenue agents that each of them took money from petitioner to influence official action, that he was probably guilty of bribery. Each internal revenue agent who had furnished an affidavit not only ran the risk of losing his job because of his admission; he implicated himself in crime. The individual declarations, moreover, did not stand alone; each was buttressed by the others. Together, they furnished more than ample probable cause to believe that petitioner should answer to the charge of bribery.

It is true that the grand jury did not ask the revenue agent to produce the affidavits for its examination. But the grand jury was not required to be skeptical of the summary by the agent. The investigator did not simply say, as in *Aguilar* v. *Texas*, 378 U.S. 108, that he had information from an undisclosed source that petitioner had violated the law.

He did not attempt to usurp the function of the grand jury. He summarized affidavits which contained specific information showing in the most direct fashion that each declarant, as well as petitioner, had violated the law.

As this Court had said of probable cause, albeit in another context (*Brinegar* v. *United States*, 338 U.S. 160, 175):

> In dealing with probable cause, * * * as the very names implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

The preliminary proceeding to determine probable cause has never been considered the equivalent of a trial to determine guilt or innocence. See *McCray* v. *Illinois*, 368 U.S. 300. The proof of probable cause has, therefore, never been restricted by the rules governing the admissibility of evidence at a criminal trial nor by the requirement of proof beyond a reasonable doubt. See *Costello* v. *United States*, 350 U.S. 359, where this Court held that an indictment could properly be founded on the testimony of expert witnesses summarizing the results of an extended investigation. Therefore, even if it were the function of the district court (which we dispute) to undertake a review of the evidence heard by the grand jury, it seems perfectly apparent that this case more than

meets those requirements which pertain to a determination of probable cause.

C. *There Is No Reason to Impute Bad Faith to the Prosecutor in Failing to Call before the Grand Jury Witnesses Who Were about to be Indicted.*

Petitioner charges that the use of an agent to summarize the contents of the sworn affidavits of the internal revenue agents who became government witnesses at the trial was part of a "policy designed to obviate the necessity of making grand jury testimony available to defense counsel." He furnishes no support for that accusation. He also ignores the fact that the witnesses in question were *de facto* defendants who were themselves indicted by the very grand jury which returned the instant indictment against petitioner. The courts have been critical of calling *de facto* defendants before a grand jury.[4] The witnesses who testified at petitioner's trial had been called before a previous grand jury at an early stage of the investigation. When they subsequently gave statements which implicated petitioner (among others) they were not again summoned—before another grand jury. We believe that this course was proper and that it most certainly will not support an inference of bad faith.

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[4] See, *e.g.*, *United States* v. *Scully*, 225 F. 2d 113 (C.A. 2), certiorari denied, 350 U.S. 897; *Powell* v. *United States*, 226 F. 2d 269 (C.A.D.C.); *United States* v. *Cleary*, 164 F. Supp. 328 (S.D.N.Y.), reversed, 265 F. 2d 459 (C.A. 2), certiorari denied, 360 U.S. 936.

We point out, moreover, that the statements of the witnesses concerning payments by petitioner antedated the grand jury's consideration of petitioner's case. The prosecutor was obviously well aware that those statements would be available to the defense under 18 U.S.C. 3500. If each witness had been called and had summarized his affidavit for the grand jury, the defense would not have been in a position materially different from that which prevailed when the statement itself was turned over at the trial. In the case of two of the witnesses, the government also turned over transcripts of tape recordings made while these witnesses were being investigated by an undercover agent (Exs. 100, 120). There was no motive, therefore, for the government to take pains to avoid producing grand jury testimony in addition to other material known to be producible under 18 U.S.C. 3500. This is not a case where petitioner, without grand jury testimony, would have had no equivalent material available to assist him in his defense.

In light of the accusation directed against the United States Attorney in the Southern District of New York, the Solicitor General requested him to comment on this charge. A copy of his reply is printed in Appendix B. He has informed us that his office has never had a policy to avoid placing witnesses who have personal knowledge before the grand jury. He observes that, prior to the *Umans* decisions, numerous indictments were obtained through hearsay testimony, primarily in the cases which were referred to the United States Attorney after a thorough investi-

gation by one of the investigating agencies. In order to assist the grand jury in handling its large volume of cases expeditiously, the government would place before the grand jury the investigating agent who conducted the numerous interviews in connection with the investigation and who could, therefore, summarize the essential testimony of the various lay witnesses. Following the comments of the court of appeals in this case and in *United States* v. *Payton*, 363 F. 2d 996 (C.A. 2), the assistants in his office have been instructed to submit to the grand jury some first-hand testimony of actual witnesses except where serious difficulties or obstacles make this impracticable.

Even under a policy which strongly favors the calling of witnesses who have first-hand knowledge, there would be a strong countervailing consideration, we submit, in the case of witnesses who are themselves putative defendants.

II

The District Court Properly Declined to Turn Over Statements by the Witnesses Recounting the Acceptance of Bribes by Persons Other Than Petitioner

As noted above, the government, at the conclusion of the testimony of each witness, turned over statements by the witness recounting his dealings with petitioner. It also tendered the recordings made in the course of the investigation of two of the witnesses. The government did not turn over to the defense, but submitted to the court, the material presently before this Court under seal; it consists of

statements relating to the acceptance of bribes by the witnesses from persons other than petitioner. As previously observed (pp. 6-7, *supra*), some of the material which was turned over, including the testimony of the witnesses before a previous grand jury, also included accounts by some of the witnesses that they had accepted money from persons other than petitioner. Despite his awareness (not only from the material turned over, but from testimony of the witnesses at the trial of other defendants) that the witnesses had taken other bribes, petitioner never pointed out to the trial court why or how he believed that the additional statements as to these bribes would aid him in his cross-examination. He merely made a blanket demand for every statement made by each government witness, whatever its nature. We urge that the trial court's refusal to honor this sweeping demand was well within its discretion since there was no basis for concluding that the statements in question would provide additional aid in cross-examination of the witnesses. To the extent that petitioner, in this Court, improvises a theory as to their possible relevance on cross-examination, he is presenting an argument that he did not make to the trial court and one which, in our view, is not supported by the record.

A. *Although 18 U.S.C. 3500 Requires the Production of Statements Useful for Cross-examination, It Was Designed to Avoid Production of Irrelevant Material, Particularly That Involving Needless Exposure of Other Persons.*

We agree with petitioner that, under 18 U.S.C. 3500, directing the production of any statement of the witnesses in the possession of the government "which relates to the subject matter as to which the witness has testified," the basic test is the relevancy of the statement to cross-examination of the witness. As stated in *Ogden* v. *United States*, 303 F. 2d 724, 740 (C.A. 9):

> * * * The problem is not whether a question framed precisely in the terms of the withheld information would relate to the subject matter of the direct examination, but rather whether the withheld material might be useful in framing questions which would be relevant to that subject matter. The appropriate analogy is found in Rule 16 of the Federal Rules of Criminal Procedure, and the proper inquiry is whether the omitted portions of the statement "may be material to the preparation" of proper cross-examination. Doubts are to be resolved in favor of disclosure, for the Court necessarily proceeds without the benefit of counsel's more intimate knowledge of the possible significance of particular information for purposes of impeachment. * * *

See also *Rosenberg* v. *United States*, 360 U.S. 367, 370. Indeed, the statutory language—"relates to the subject matter as to which the witness has testified"

—reflects the traditional formulation of the limits of cross-examination. See, *e.g.*, *United States* v. *Minuse*, 142 F. 2d 388, 389 (C.A. 2).

The history of the Jencks Act confirms the proposition that possible use in permissible cross-examination was the underlying function which the legislation sought to implement. In *Jencks* v. *United States*, 353 U.S. 657, there was no question that the documents would have been useful to the defense in the proper cross-examination of the principal government witness and therefore related to the subject matter of the witness' testimony. The reports and statements there withheld from the defense contained different accounts of the very events and activities as to which the witness had testified. Thus, the opinion states that "[r]elevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness." 353 U.S. at 669.

In order to confine production to pertinent matter which has a use in permissible cross-examination, Congress adopted this language of the *Jencks* case and restricted the production of statements of the witness to those "which relate to the subject matter as to which the witness has testified." The dual purpose was to guard against needless disclosure of confidential information while at the same time assuring that a criminal defendant had access to material "pertinent to the testimony of government witnesses." H. Rep. No. 700, 85th Cong., 1st Sess., p. 2. The

Senate Committee pointedly declared (S. Rep. 981, 85th Cong., 1st Sess. p. 5):

> It appears to the committee that, briefly stated, the theory of the majority of the Court is that if the Government sends into court a witness to testify against a defendant, and the Government has, at the same time in its files, an authenticated statement or report by the witness *having to do with the activities of the defendant*, the defendant is justified in asking for and receiving an order compelling the presentation in court of the material *if it relates to the testimony of the witness* * * *" (emphasis added).

The House Committee also showed its desire to avoid the needless exposure of the names of innocent persons. It included in its report a statement of the Attorney General that the proposed legislation would safeguard reports about other persons or other transactions. H. Rep. No. 700, 85th Cong., 1st Sess., pp. 3, 12. The Senate Report used as an illustration of extraneous matter which need not be produced statements about another check forgery for which the defendant was not being tried. S. Rep. No. 981, 85th Cong., 1st Sess., p. 7. The Act therefore established a procedure, followed here, whereby the trial court could examine material to determine whether production was required, without turning over to the defense every statement by the witness which might be in the government files.

B. *Since the Material Withheld Did Not Bear on the Charge at Issue and Involved Persons Not on Trial, the Trial Court Properly Exercised Its Discretion in Declining to Turn It Over.*

The trial court properly exercised its discretion in refusing to turn over to petitioner materials which related details having nothing to do with petitioner, but involving other persons who dealt with the witnesses, some of whom were under indictment and awaiting trial. Petitioners had more than ample basis —from the materials turned over and by reference to other indictments and prior trials—for conducting cross-examination which would show that the witnesses had taken bribes from others. There was no reason to turn over materials which went beyond that and set out the details of other transactions not involved in this case. The trial court, which has always been accorded a broad discretion in fixing the limits of proper cross-examination, was justified in concluding that such collateral details were unnecessary and might injure the reputations of persons not involved in the instant proceeding.

As petitioner himself recognizes (Pet. Br. 37), a trial judge has a wide area of discretion as to whether to permit any impeachment at all on the basis of other similar acts of misconduct. There is no universal agreement that specific acts of misconduct, not resulting in a conviction, are an appropriate subject of cross-examination at all. Some cases forbid all such queries in the absence of a conviction. See *Homan* v. *United States*, 279 F. 2d 767, 771-772 (C.A. 8), certiorari denied, 364 U.S. 866; *United*

States v. *Provoo*, 215 F. 2d 531, 535-537 (C.A. 2). Other decisions place such an inquiry in the discretion of the trial judge and require that the inquiring party be bound by the answer of the witness. See *United States* v. *Irwin*, 354 F. 2d 192, 198 (C.A. 2), certiorari denied, 383 U.S. 967; *United States* v. *Sweeney*, 262 F. 2d 272, 276-277 (C.A. 3); *United States* v. *Sager*, 49 F. 2d 725, 730 (C.A. 2); *Pullman Co.* v. *Hall*, 55 F. 2d 139, 141 (C.A. 4); *Simon* v. *United States*, 123 F. 2d 80, 85 (C.A. 4), certiorari denied, 314 U.S. 694; *Coulston* v. *United States*, 51 F. 2d 178, 181-182 (C.A. 10). This form of cross-examination is restricted because it is collateral to the main inquiry and is subject to the danger that it may confuse the issues and prolong the trial. In some instances, it may engender or open up false charges against the witness and persons said to have participated with him in his alleged misconduct.

As in the case of cross-examination itself, the production of statements not directly relating to the charges at issue must rest in the discretion of the trial court. As stated in *Palermo* v. *United States*, 360 U.S. 343, 353:

> * * * Final decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge guided by the standards we have outlined, and subject to the appropriately limited review of appellate courts.

If the rule were otherwise, the government would be compelled to turn over documents to the defense

which would serve no function in proper cross-examination. To be sure, production of statements may be somewhat broader than their permissible use on cross-examination. Nonetheless, production presupposes a reasonable likelihood that the documents might be useful to an examination which the court would permit. Surely the court need not order the production of statements which go to matters which the court would not, or need not, permit counsel to pursue on cross-examination.

C. *Petitioner's Present Theories Concerning the Need for the Withheld Material on the Basis of the Particular Answers Given by the Witnesses at Trial Were Not Advanced to the Trial Court and Are Not Supported by the Record.*

In this Court petitioner advances various arguments as to the possible utility of the withheld statements, pointing to alleged deficiencies in the responses of the witnesses given at the trial. He alleges that the absence of the withheld material impeded him in framing proper questions to some witnesses and in attacking the credibility of others. We submit that this is an effort to construct on appeal an argument of necessity which never occurred to counsel at the trial, where, presumably, the necessity would be evident. In fact, at trial, petitioner presented no argument showing a need for statements implicating other taxpayers or taxpayers' representatives; he merely made a blanket demand for every statement given by the witness. If there was some particularized need, not readily apparent, why trial counsel felt he had to have the details as to such other transactions, it

was his duty to call the court's attention to the reasons. As we have pointed out, this is not a case in which it could be said that a need for material involving other persons should have occurred to the judge *sua sponte;* to the contrary, nothing in the case or in the testimony of the witnesses would suggest the need to go into these details. In such circumstances, counsel is not entitled to rest on his blanket demand in the hope that some justification will occur to him later.

In addition, the record fails to support petitioner's belated attempt to show need for the material in question.

1. As to two of the witnesses, Ellington and Levine, the claim is made that, since no questions were asked in cross-examination about other bribes, petitioner was left completely in the dark about other payments. But petitioner was given Exhibits 106 and 107 (R. 48), in which Ellington detailed his acceptance of bribes from two accountants and his acceptance of a gift from a third. Petitioner was also given Levine's earlier grand jury testimony where he admitted receiving money from petitioner and two other accountants (Exs. 148, 145). He also knew that Levine had been indicted in another case (R. 97). There was thus no reason why petitioner could not have cross-examined these witnesses along these lines to the same extent as he did the other witnesses.

2. As to other witnesses, petitioner established that they had taken bribes and had not reported these bribes as taxable income (see, *e.g.*, Tr. 95). As we

have pointed out, he had no absolute right to pursue further cross-examination on this subject. Further testimony about other specific acts of misconduct would have confused the issues involved in this case, leading to the trial of the ultimate issues involved in other bribery cases. There is thus no merit in petitioner's suggestion that the testimony of three of the witnesses that they were named in other indictments and were cooperating with the government broadened the subject matter of their direct testimony so as to open up the whole range of inquiry into the details of other bribes, albeit those details had no relation to the facts here at issue.

3. Petitioner argues (Pet. Br. 42-49) that he needed the statements because the witnesses were more "precise" in their testimony as to their dealings with petitioner than they were as to their dealings with other accountants. Actually, as his own summary of their cross-examination shows, they were rather imprecise as to the total amounts taken and as to the dates, but not in answering the question whether they took money from others. How it would have aided the defense to confront the witnesses with prior statements which might have refreshed their recollection as to specific dates and payments, instead of arguing to the jury the possible implications of the allegedly greater specificity in their recollection of transactions involving petitioner, is unexplained. Be that as it may, petitioner's argument itself shows how far afield any cross-examination based on the specific facts of other transactions would have taken the trial. To go into minute details as to the amounts

and dates of other payments would have unduly and unnecessarily complicated a trial which related to petitioner alone. The trial judge was under no obligation to permit such a collateral excursion.

III

Petitioner Was Not Convicted of Mutually Inconsistent Crimes.

A. Counts 10 through 12 charged petitioner, under 18 U.S.C. 201(f), with making payments to the auditors "for and because of official acts performed and to be performed by said public officials, to wit, the office audit" of income tax returns (R. 7-8). Counts 25 through 27 charged, under 18 U.S.C. 201 (b), that he made the same payments "with intent to influence official acts, to wit, the office audit" of income tax returns (R. 10-11). Petitioner contends that neither his convictions under 18 U.S.C. 201(f) nor his convictions under 18 U.S.C. 201(b) can stand because the subsections define mutually inconsistent claims.* The court of appeals rejected this argument, concluding that Section 201(f) defined a lesser-included offense under Section 201(b). Finding that "[t]here is no reason to believe that Congress intended that there should be concurrent convictions

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*The Court need not consider all of the arguments that petitioner directs at various counts of the indictment. Since petitioner received concurrent sentences, the judgment may be affirmed if any one of these contentions is rejected. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Lawn* v. *United States*, 355 U.S. 339, 362. As pointed out *infra*, p. 33, one of the contentions now made was not presented in the petition for a writ of certiorari.

and sentences under both sections" (R. 144), it vacated the sentences on the lesser (Section 201(f)) counts. The conclusion of the court below that there was no repugnancy between the sections is supported both by the language and legislative history of the statute.

The statute was enacted by Congress in 1962 as part of a bill "to strengthen the criminal laws relating to bribery, graft, and conflicts of interest * * *." S. Rep. No. 2213, 87th Cong., 2d Sess., p. 1. The bill contained a variety of sanctions appropriate for different degrees of delinquency. Section 201(b)(1) proscribes payments with the intent "to influence any official act," and fixes a maximum penalty of fifteen years' imprisonment. Section 201(f) relates to payments "for or because of any official act" and provides a maximum penalty of only two years. The former aims at the act of corruptly giving money to a public official with *intent to influence action*. The latter deals with gifts made to a public official for his official acts. It requires no proof of intent to influence official action. See *United States* v. *Irwin*, 354 F. 2d 192, 196-197 (C.A. 2), certiorari denied, 383 U.S. 967. A finding by the jury that petitioner gave money to the various agents in violation of 18 U.S.C. 201(f) would not preclude the further finding that the money was given corruptly with intent to influence their official action in violation of 18 U.S.C. 201(b).

Petitioner's argument to the contrary rests upon a misreading of Section 201(f). In his view (Pet. Br.

50-52), that section proscribes a payment for a "proper" discharge of an official act. However, the quoted phrase, is part of a clause—"otherwise than as provided by law for the proper discharge of official duty"—language plainly designed only to exclude from the section's coverage whatever payments might be made to an official in the normal course of his duty, such as his salary and fees. The House Committee report expressly states (H. Rep. No. 748, 87th Cong., 1st Sess., p. 19):

> * * * The phrase "otherwise than as provided by law for the proper discharge of official duty" is used in subsections (f) and (g) in order to permit lawful payments for the performance of official acts. The conduct which is forbidden has the appearance of evil and the capacity of serving as a cover for evil. * * *

Thus, Congress has concluded that any payment, whatever the motive, to a federal employee for the performance of his official acts is an evil and should be deterred. If, however, the payment is coupled with the added element of an intent to influence official action, the crime becomes aggravated and a heavier penalty may be imposed. There is nothing inconsistent in this scheme.

B. Counts 1 through 9 charged petitioner with aiding and abetting a named internal revenue agent in receiving fees not prescribed by law for the performance of a duty, in violation of 26 U.S.C. 7214(a)(2) and 18 U.S.C. 2 (R. 6-7). Counts 16 through 24 covered the same transactions, and charged that petitioner paid the internal revenue agents with intent to in-

fluence their action in a matter pending before them in their official capacities, in violation of 18 U.S.C. 201, as it existed prior to the effective date of the 1962 amendments (R. 9-10). Petitioner contends that these counts are inconsistent with each other in the same manner as the counts arising out of the amended bribery statute. This issue is not properly here since it was not presented in the petition for a writ of certiorari. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362, note 16; *Local 1976, United Brotherhood of Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 96, note 1; *Irvine* v. *California*, 347 U.S. 128, 129-130 (plurality opinion of Mr. Justice Jackson); Rule 23-1(c) of the Rules of this Court. Petitioner has not shown "exceptional circumstances" requiring this Court to rectify "plain error" or errors which "seriously affect the fairness, integrity of public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160; *Silber* v. *United States*, 370 U.S. 717; *Duignan* v. *United States*, 274 U.S. 195, 200; Rule 40-1(d)(2) of the Rules of this Court.

In any event, an examination of the two statutes shows that petitioner's argument lacks merit. Again, petitioner's argument rests upon the misconception that Congress meant to distinguish between "proper" and improper payments to government officials for the performance of official duties. Congress, however, made no such distinction. As 26 U.S.C. 7214 shows on its face, all payments to officials are viewed as an evil except payments "as by law prescribed for

the performance of any duty." The other statute, 18 U.S.C. 201 (as it read until January 20, 1963), requires a payment "with intent to influence" official action, *infra*, p. 37. There is thus, as the court of appeals said, "no contradictory elements of required proof between the two statutes; only additional elements of proof" (R. 142-143).

IV

Petitioner Could Properly Be Convicted of Aiding and Abetting the Receipt of Illegal Fees by Internal Revenue Agents.

Petitioner also argues that under Counts 1 through 9 he could not be convicted as an aider and abettor of the Internal Revenue agents who received money from him because Congress did not intend to cover such conduct under the aider and abettor statute, 18 U.S.C. 2. However, the history of the 1951 amendment to the aider and abettor statute removes any possible doubt that petitioner was properly convicted.

Prior to 1951, 18 U.S.C. (1948 ed.) 2(a) provided: "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission is a principal." In 1951, Congress concluded that the statute might be subject to the interpretation that a person incapable of being a principal could not be an aider and abettor. It therefore changed the statute to make the aider and abettor "punishable as a principal" rather than "a principal." In explaining the need for this amendment, the Senate Committee stated (S. Rep. No. 1020, 82d Cong., 1st Sess., pp. 7-8):

> This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. Some criminal statutes of title 18 are limited in terms to officers and employees of the Government, judges, judicial officers, witnesses, officers or employees or persons connected with national banks or member banks. (footnotes omitted.)

Congress thus expressly declared that it wished to make certain that aiders and abettors could be punished even though they were incapable of committing the specific violation which they were charged with having aided and abetted. Therefore, petitioner, having made payments which he knew the agents could not lawfully receive, was properly convicted as an aider and abettor of the agents' receipt of illegal fees. *United States* v. *Kenner*, 354 F. 2d 780 (C.A. 2), certiorari denied, 383 U.S. 958; *May* v. *United States*, 175 F. 2d 994 (C.A.D.C.), certiorari denied, 338 U.S. 830; see also *United States* v. *Johnson*, 337 F. 2d 180 (C.A. 4), certiorari denied *sub nom. Edlin* v. *United States*, 385 U.S. 846.[6]

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[6] The conspiracy cases relied upon by petitioner are not in point. They simply hold that a person may not be found guilty of conspiracy where the same agreement is a necessary element of the substantive offense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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Attorneys.

SEPTEMBER 1967

APPENDIX A

18 U.S.C. (1958 ed.) 201, in effect prior to January 21, 1963, provided:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency * * * with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.
>
> * * * *

18 U.S.C. 201, 76 Stat. 1119 (effective January 21, 1963) provides in part:

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official * * * with intent—
>
> (1) to influence any official act * * *
>
> * * * *

Shall be fined not more than $20,000 * * * or imprisoned for not more than fifteen years, or both * * *.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official * * * for or because of any official act performed or to be performed by such public official * * *

* * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

26 U.S.C. 7214 provides in part:

(a) Unlawful acts of revenue officers or agents.

Any officer or employee of the United States acting in connection with any revenue law * * *

* * * *

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; * * *

* * * *

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. * * *

APPENDIX B

August 21, 1967

Thurgood Marshall, Esq.
Solicitor General of the United States
Washington, D. C. 20530

Re: Grand Jury Practice in the Southern District of New York

Dear Mr. Marshall:

We have given careful attention and consideration to the questions put in your letter of August 1, 1967 with respect to our practice before the grand juries.

You ask whether there was a policy in the Southern District of New York of avoiding placing witnesses who have personal knowledge before the grand jury. There is not and was not a policy in effect designed to secure that end. Needless to say, prior to the decision of the Second Circuit Court of Appeals in *Umans*, numerous indictments were obtained through hearsay testimony. However, where this was so, it was generally motivated by extremely difficult organizational problems of time and convenience in grand jury practice in the Southern District rather than by a policy of keeping witnesses with personal knowledge from testifying.

During most of the year, grand juries in the Southern District have their schedule booked up two and three weeks in advance, largely due to the press of daily cases of thefts from the mails, thefts from interstate shipments, forging of Government checks and sales of narcotics. The regular grand juries serving during the busy months commonly return an average of seven or eight indictments per day. Reliance on solely first-hand personal knowledge testimony in these daily cases of overwhelming number

would decimate the efficiency and productivity of the grand juries since it would gen(ally require the appearances in each case of three or four different witnesses who are not in Government service and whose inexperience in such proceedings would tend to slow them down even when the witnesses were available.

In the ordinary cut and dried case in which the facts are referred to the United States Attorney only after a thorough investigation by one of the investigative agencies, it has never been and it never should be the practice to try the merits of the case before the grand jury. The practice rather has been to present before that body a concise showing of the existence of clearly sufficient probable cause. It was primarily in those cases that the heaviest reliance was placed on the use of hearsay since enormous gains of convenience and efficiency were accomplished by placing before the grand jury the investigating agent who conducted the numerous interviews in connection with the investigation and who could, therefore, summarize the essential testimony of the various lay witnesses to show probable cause.

Since the decisions of the Second Circuit Court of Appeals in *Umans* and *Payton*, however, Assistants in this office have been given clear and unequivocal instructions to submit to the grand jury some firsthand testimony of actual witnesses except where serious practical difficulties or obstacles make this impracticable. To my knowledge this practice is being uniformly followed.

I hope this information will be helpful to you.

Very truly yours,

ROBERT M. MORGENTHAU
United States Attorney

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